IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

INTEC USA, LLC, Plaintiff, v. JONATHAN ENGLE, RAPH ENGLE, IBEX TECHNOLOGIES LIMITED, IBEX INDUSTRIES LIMITED, IBEX INDUSTRIES PTY LIMITED IBEX TECHNOLOGIES PTY LIMITED IBEX THERMAL PROCESSING LTD. IBEX DO BRAZIL LTDA, SYSTEMS TECHNOLOGY (NZ) LIMITED, and ILLUM LIMITED, Defendants.	)	1:05CV468

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court on a motion by certain Defendants to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure [docket no. 3]. Since there has been no consent, the court must deal with the motion by way of a recommended disposition. Plaintiff has responded to the motion, and the matter is ripe for disposition. For the reasons discussed herein, it will be recommended that the court grant the motion to dismiss.

PROCEDURAL BACKGROUND

This case arises out of a dispute over a non-compete agreement between Plaintiff Intec USA, LLC, a North Carolina limited liability company based in Durham,

North Carolina, and ten foreign Defendants, including two individuals and eight corporate entities. Plaintiff filed this action in North Carolina state court on April 26, 2005, and Defendants removed it to this court on May 25, 2005, based on diversity jurisdiction. The parties are all generally engaged in the food refrigeration/freezing business, described here more specifically as the "Materials Handling Industry."[1] The Complaint alleges, among other things, that Defendants breached a contract in which they agreed not to compete with Plaintiff in the Materials Handling Industry in certain "Protected Territories," which includes Australia, New Zealand, Japan, and the Americas north of the Panama Canal, including the Caribbean, as well as any other States or territories of the United States.

The two individual Defendants are Jonathan Engle and his father Raph Engle. Defendants Jonathan Engle and Raph Engle are citizens and residents of New Zealand. The eight corporate Defendants are companies that were formed by the Engles. The IBEX entities are all foreign corporations with no offices in North Carolina or elsewhere in the United States. Specifically, IBEX Technologies, Ltd., IBEX Industries, Ltd., Systems Technology (NZ) Ltd., and Illum, Ltd. are New Zealand companies with their sole offices located in New Zealand; IBEX Technologies, Pty., Ltd. and IBEX Industries Pty., Ltd. are Australian companies with

[1] The "Materials Handling Industry" is defined in a contract between the parties as "materials handling systems relating to temperature change of product (i.e., heating, cooling, or freezing), stabilizing product temperatures (i.e., proofing, aging, and tempering), and/or ASRS systems (Automatic Storage Retrieval Systems, such as the Unistore)."

their sole offices located in Australia; IBEX do Brazil, Ltda. is a Brazilian company with its sole office located in Brazil; and IBEX Thermal Processing, Ltd. is a United Kingdom company with its sole office located in the United Kingdom.

BACKGROUND FACTS

Defendant Raph Engle, a citizen of New Zealand, is the developer of certain materials handling technology for food products. Engle brought his technology to the United States and in the late 1980s created the Intec Corporation, which will be referred to here as "Old Intec." At some point, Engle sought to sell Old Intec and its technology. In 1997 he sold two thirds of his business to Tim Flynn and John Smith, resulting in a three-member partnership in the business now operating as Plaintiff Intec USA, LLC (hereinafter Plaintiff or "Intec"). As part of the transaction, Engle was exonerated from the substantial liabilities of Old Intec and was not required to take the risk for substantial borrowing that was needed to fund the business going forward. The Intec Operating Agreement also generally prohibited Engle from competing with Intec in the Materials Handling Industry. According to Plaintiff, several years after the 1997 sale, and while the non-compete agreement was still in effect, Raph Engle and his son Jonathan Engle created the various IBEX entities to compete with Intec in the Materials Handling Industry in violation of the Intec Operating Agreement.

The Arbitration Initiated in North Carolina

In 2003, Plaintiff (and others not parties to this suit) initiated arbitration in North Carolina against Defendants Raph Engle and Systems Technology (NZ) Ltd.

and threatened legal action against Jonathan Engle and the various IBEX entities arising from their violation of the Intec Operating Agreement.[2] The Arbitration against the Engles and their companies was ultimately settled pursuant to an "Award on Agreed Terms" and a letter agreement between Plaintiff and the remainder of the current Defendants. The Award on Agreed Terms and letter agreement generally prohibit Defendants from competing with Plaintiff in the Materials Handling Industry for a certain time period. The Award on Agreed Terms was dated October 23, 2003, and was signed in North Carolina by John Smith for Intec, by Tim Flynn individually, and by Raph Engle individually and on behalf of Systems Technology (NZ) Ltd. and Raph Engle Consulting Ltd. The parties do not dispute that Plaintiff signed the letter agreement in North Carolina and that Defendant Jonathan Engle signed the letter agreement in New Zealand on behalf of the IBEX entities. The letter agreement contemplated that Plaintiff and IBEX Technologies, Ltd. would attempt to negotiate for an "exclusive marketing, manufacturing, and technology cooperation agreement ("Marketing Agreement") with respect to the sale of Intec within the Territory . . . of IBEX products in the Materials Handling Industry." The Letter Agreement contemplated a negotiation period of ninety days, during which IBEX Technologies, Ltd. and the other IBEX entities would forego competition with Plaintiff. Plaintiff has now brought this lawsuit alleging, among other things, that Defendants have

[2] The claimants in the arbitration suit were Intec USA, LLC, Intec Pacific Limited, Tim Flynn, and John Smith. The respondents were Systems Technology (NZ) Limited and Raph Engle.

breached the non-compete provisions of the Award on Agreed Terms and letter agreement. All Defendants except for Raph Engle and Systems Technology (NZ) have moved for dismissal based on lack of personal jurisdiction.

DISCUSSION

I. Personal Jurisdiction

When a court's exercise of personal jurisdiction is challenged pursuant to a Rule 12(b)(2) motion, the plaintiff must prove the existence of a ground for jurisdiction by a preponderance of the evidence. *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). If jurisdiction turns on disputed facts, the court may conduct an evidentiary hearing, or postpone ruling on the motion pending receipt of evidence relating to jurisdiction at trial. *Id.* If the court, as here, considers the jurisdictional challenge based solely on motion papers, supporting legal memoranda, and pleadings, the plaintiff need only make a prima facie showing of a sufficient jurisdictional basis. *Id.* When considering a jurisdictional challenge based on the record, the court must construe allegations contained in the pleadings in the light most favorable to the plaintiff, assume credibility, and the most favorable inferences stemming from the evidence must be drawn in favor of the existence of jurisdiction. *Id.* The Fourth Circuit has held, however, that "[a]lthough it is true that the plaintiff opposing a Rule 12(b)(2) motion to dismiss for lack of jurisdiction is entitled to have all reasonable inferences from the parties' proof drawn in his favor, district courts are not required . . . to look solely to the plaintiff's proof in drawing those inferences." *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62 (4th Cir. 1993).

To determine whether personal jurisdiction is proper, the court must engage in a two-part inquiry. First, the long-arm statute of North Carolina must provide a statutory basis for the assertion of personal jurisdiction and, second, the exercise of personal jurisdiction must comply with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id.* Courts have made clear that North Carolina's long-arm statute is to be construed liberally "to extend jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause."[3] *Christian Sci. Bd. of Dirs. of the First Church of Christ v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001) (citing *Century Data Sys., Inc. v. McDonald*, 109 N.C. App. 425, 427, 428 S.E.2d 190, 191 (1993)). Here, Plaintiff argues that personal jurisdiction can be found under various sections of North Carolina's long-arm statute, including N.C. GEN. STAT. §§ 1-75.4(1), 1-75.4(3), 1-75.4(4), and 1-75.4(5). Defendants have submitted affidavits supporting their argument that jurisdiction may not be found under any of these sections of the statute. Here, it is not necessary to determine whether Plaintiff can show jurisdiction under any of these sections of the long-arm statute because, in any event, Defendants do not have sufficient minimum

[3] Thus, courts will often bypass the first step and proceed directly to the due process inquiry, asking whether the defendant has minimal contacts with North Carolina such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *See, e.g., CBP Res., Inc. v. Ingredient Res. Corp.*, 954 F. Supp. 1106 (M.D.N.C. 1996) (citing *Ellicott Mach. Corp. v. John Holland Party Ltd.*, 995 F.2d 474, 477 (4th Cir. 1993)); *but see also Plant Genetic Sys., N.V. v. Ciba Seeds*, 933 F. Supp. 519, 522-23 (M.D.N.C. 1996) (following the rule that "both prongs of the test must be analyzed") (citing *English & Smith v. Metzger*, 901 F.2d 36 (4th Cir. 1990)).

contacts with North Carolina such that asserting personal jurisdiction over them would comport with due process.

For a State to exercise personal jurisdiction over a non-resident defendant, due process requires that the defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994). When examining the sufficiency of a non-resident defendant's contacts, "[t]he touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state." *Id.* In short, jurisdiction is proper when a relationship exists between the defendant and the forum "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Personal jurisdiction may be exercised either specifically or generally. *Slaughter v. Life Connection of Ohio*, 907 F. Supp. 929, 933 (M.D.N.C. 1995). Specific jurisdiction is established where the forum state asserts personal jurisdiction over a defendant in a suit "arising out of or related to" that defendant's contacts with the state. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). By contrast, general jurisdiction is established where the defendant's contacts with the forum state have been systematic and continuous even though the contacts do not have any relation to the plaintiff's claim. *Id.* With these principles in mind, the court turns to the issue of whether the moving

Defendants have sufficient contacts with North Carolina such that maintenance of this case in North Carolina comports with due process.

Here, the undisputed facts show that the moving Defendants' limited activities in North Carolina do not provide grounds for North Carolina to assert general jurisdiction over them. Defendants point out in sworn statements, for instance, that they are all foreign citizens with offices located outside of the United States, and "[i]ndeed, none of these defendants has ever maintained an office, telephone listing, post office box, mailing address, bank account, or registered agent for service of process in North Carolina." IBEX Entities Aff. at ¶ 7; Engle Aff. at ¶ 4. Defendants further attest that none of them has derived income directly from North Carolina, registered to do business in this State, sold or transported any products in North Carolina, rendered services in North Carolina, or possessed any interest in assets located in North Carolina, including real property. IBEX Entities Aff. at ¶¶ 8-11; Engle Aff. ¶¶ 7, 8, 10. The moving Defendants maintain that aside from the 2003 letter agreement, none of them has ever transacted any business whatsoever in the State of North Carolina or with North Carolina citizens, except for with their current counsel, the Smith Anderson law firm. *See* IBEX Entities Aff. at ¶ 9; Engle Aff. at ¶ 10. Indeed, for all of the IBEX entities except for IBEX Technologies, Ltd., their interaction with Plaintiff began and ended with the single act of executing the letter

agreement in New Zealand.[4] Defendants point out that even IBEX Technologies, Ltd. had only two further interactions with Plaintiff after executing the 2003 letter agreement in New Zealand. The first of these were the limited negotiations contemplated by that agreement, in which Plaintiff's representatives traveled to New Zealand for a meeting with representatives of IBEX Technologies, Ltd.[5] The second and last of these interactions concerned Plaintiff's apparent breach of its obligations under the 2003 letter agreement by interfering with IBEX Technologies Ltd.'s contract with a corporation in Pennsylvania.

Plaintiff does not appear to dispute the assertions by the moving Defendants showing that they have not regularly conducted business in North Carolina, except for pointing out that in late 2003, Defendants proposed selling $743,674.26 worth of equipment to Plaintiff in North Carolina. *See* Ex. 7 to Pl.'s response to Defs.' Mot. to Dismiss for Insufficient Service of Process; John Smith Aff. ¶ 11. Furthermore, Plaintiff argues that jurisdiction is proper because Defendants have "made it clear" that they consider the entire United States to be their marketplace. *See* John Smith Aff. ¶ 13. The court finds that this one proposal to sell equipment, even if true, is not

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[4] According to Defendants' sworn affidavits, neither Jonathan Engle nor any other representative of the IBEX entities ever traveled to North Carolina to negotiate the letter agreement, and Engle signed the letter agreement on behalf of the IBEX entities in New Zealand. *See* Engle Aff. ¶ 3; IBEX Entities Aff. ¶ 12.

[5] The parties to the New Zealand negotiations did not ultimately agree on any future business relationship, and the discussions between them ended. IBEX Entities Aff. ¶ 12.

enough to show continuous and systematic contacts with North Carolina sufficient to exercise general jurisdiction. Furthermore, Plaintiff's vague statement about Defendants considering the entire United States as their marketplace hardly shows that Defendants conducted systematic and continuous activities in North Carolina.

Plaintiff presents two additional arguments for asserting general jurisdiction against Defendants: based on Defendants' retention of North Carolina counsel and because Defendants have threatened to sue Plaintiff in North Carolina. As for Plaintiff's allegations regarding the retention of North Carolina counsel, Jonathan Engle has submitted an affidavit on behalf of the various IBEX entities stating that the IBEX entities retained the Smith Anderson law firm on only two prior occasions: (1) in late 2003, to assist in negotiating and finalizing the 2003 letter agreement between Plaintiff and the IBEX entities; and (2) a few months later, to notify Plaintiff of conduct by Plaintiff that the IBEX entities believed to be in breach of the letter agreement. *See* Second Aff. of IBEX Entities ¶ 3. As the United States Supreme Court has made clear, "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958). Here, Plaintiff cannot create personal jurisdiction over Defendants based on the fact that Defendants were required to hire local counsel to defend against Plaintiff's arbitration case and threatened legal action.

As for Plaintiff's jurisdictional allegations about Defendants' alleged threat to sue Plaintiff in North Carolina, Plaintiff is apparently referring to a "cease and desist" letter sent from the Smith Anderson law firm to Plaintiff's counsel in Seattle, Washington. *See* Letter from K. Alan Parry to Alan Bornstein of February 26, 2004. In the letter, attorneys from the Smith Anderson law firm accused Plaintiff of trying to induce a third party into breaching a contract with IBEX. The letter warns that if Plaintiff "does not immediately cease its unlawful contact with [the third party], IBEX will be forced to consider its full range of legal options against Intec, including, *inter alia*, claims for tortious interference with contract." Here, the court agrees with Defendants that this letter, sent to Washington State, did not clearly threaten litigation in North Carolina and cannot serve as a basis for asserting personal jurisdiction over Defendants.

Finally, Plaintiff points out that the letter agreement and Award on Agreed Terms contain choice of law provisions stating that North Carolina would apply in the event of a dispute. Although a choice of law provision is certainly a factor to consider in the jurisdictional analysis, it is insufficient alone to confer jurisdiction. This court finds that, considering the dearth of Defendants' contacts with the State of North Carolina, this one factor will not alter the conclusion that general jurisdiction is simply lacking. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985) (stating that a choice of law provision is only one contact to be considered in assessing whether a defendant has minimum contacts with the forum state). In sum, the court finds that it cannot assert general jurisdiction against the moving Defendants.

As for whether the court may find specific jurisdiction, the dispute in this case arises over Defendants' alleged breach of a contract (arising out of an arbitration action initiated by Plaintiff in North Carolina) which was signed by Defendants in New Zealand, which contemplated negotiations that took place in New Zealand, and which stated that Defendants would not compete with Plaintiff in a certain area of food products technology over a vast geographical area for a limited time. Plaintiff alleges that Defendants breached the letter agreement, but Plaintiff does not even allege that its breach of contract claim (or its tortious interference claim) arises from any actions or omissions by Defendants in North Carolina. *See Ellicott Mach. Corp., Inc. v. John Holland Party Ltd.*, 995 F.2d 474, 478 (4th Cir. 1993) (observing that out-of-state contract performance mitigates against the assertion of personal jurisdiction in the forum state); *Tejal Vyas, LLC v. Carriage Park LP*, 166 N.C. App. 34, 43, 600 S.E.2d 881, 888 (2004) (stating that "the mere act of entering into a contract with a forum resident . . . will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendants' performance . . . are to take place outside the forum") (quoting *Phoenix Am. Corp. v. Brissey*, 46 N.C. App. 527, 532, 265 S.E.2d 476, 480 (1980)). In any event, "a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts with this State." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 786 (1986). In addition to a single contract, there must be a "substantial

connection" to the state to uphold personal jurisdiction. *Id.* (citing *Burger King Corp.*, 471 U.S. at 478). In sum, the moving Defendants, none of which are United States citizens, have submitted affidavits asserting that they do not conduct business in North Carolina, that the only contacts with North Carolina resulted from an arbitration that was initiated in North Carolina by Plaintiff, and that as a result of the arbitration, Defendants agreed not to compete with Plaintiff over a vast geographical territory, which included North Carolina. Given the Supreme Court's admonition that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987), this court concludes that sufficient minimum contacts between the moving Defendants and North Carolina have not been shown, and this court cannot assert personal jurisdiction against the moving Defendants without offending due process principles.[6]

II. Plaintiff's Request to Conduct Jurisdictional Discovery

In the face of the moving Defendants' sworn testimony detailing their limited contacts with North Carolina, Plaintiff has not produced any evidence demonstrating

[6] Finally, to the extent that Plaintiff suggests that the mere act of removal constitutes a general appearance, thereby waiving any right to object to the lack of personal jurisdiction, the court disagrees. *See Nationwide Eng'g & Control Sys., Inc. v. Thomas*, 837 F.2d 345, 347-48 (8th Cir. 1988) ("Removal, in itself, does not constitute a waiver of any right to object to lack of personal jurisdiction."); *see also* 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1395 (3rd ed. 2004).

that Defendants' contacts are other than as described in the affidavits. Instead, Plaintiff asks for this court to allow it to conduct jurisdictional discovery based on its belief that jurisdictional discovery "will ultimately reveal that the Defendants' contacts with North Carolina have been far more substantial than they have attempted to lead this court to believe." Specifically, Plaintiff asserts that "the following facts could be proved through discovery" and would contradict the affidavits submitted by Defendants: (a) "Plaintiff knows that Mr. [Jonathan] Engle has, as recently as last year, been in the Southeast United States, therefore, Plaintiff believes he may have also visited North Carolina"; (b) the Smith Anderson law firm has represented Defendants on more than one occasion since 2003 and, therefore, Plaintiff believes that the law firm has acted as Defendants' "United States base of operations"; and (c) "Plaintiff believes that IBEX products are used in North Carolina and that discovery would reveal that IBEX does derive income from North Carolina."

Courts have repeatedly held that speculation and conclusory allegations are not sufficient bases to subject a foreign defendant to the burdens of jurisdictional discovery. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003) (stating that where the plaintiff "offers only speculation or conclusory assertions" jurisdictional discovery is properly denied); *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 259 (M.D.N.C. 1988) ("[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited

discovery confined to issues of personal jurisdiction should it conclude that such discovery will be a fishing expedition."). Here, the court finds that Plaintiff's request for jurisdictional discovery is based on nothing more than unfounded speculation about Defendants' potential additional contacts with North Carolina, and the court finds no basis to subject the moving Defendants to the burden and expense of further jurisdictional discovery. Therefore, Plaintiff's request for jurisdictional discovery is denied.

CONCLUSION

In sum, the court finds that Plaintiff has not shown that the moving Defendants' contacts with North Carolina are sufficient to exercise personal jurisdiction over them. Based on the foregoing, **IT IS RECOMMENDED** that Defendants' motion to dismiss for lack of personal jurisdiction be **GRANTED**. Thus, it is recommended that the court order dismissal as to all Defendants except for Defendants Raph Engle and Systems Technology (NZ) Ltd.

WALLACE W. DIXON
United States Magistrate Judge

Durham, NC

September 8, 2005.